

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PETROLEUM TANK RELEASE
COMPENSATION BOARD**

In the Matter of the Appeal of the Denial
of the Application for Reimbursement of
Service Oil Company, MPCA Leak No.
6899

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

Administrative Law Judge James E. LaFave conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on Thursday June 29, 2006, at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota.

Michael J. Tostengard, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101, appeared as the attorney for the Minnesota Department Commerce, Petroleum Tank Release Compensation Board ("Agency" or "Board"). Dirk Lenthe, 1718 East Main Avenue, West Fargo, ND 58078 appeared on behalf of Service Oil, Inc. ("Service Oil") The record closed on June 29, 2006 when the hearing ended.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Commerce will make the final decision after reviewing the hearing record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minnesota Law,¹ the Commissioner may not make his final decision until after the parties have had access to this Report for at least ten days. During that time, the Commissioner must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument. Parties should contact the office of Glenn Wilson, Commissioner, Minnesota Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, MN 55101, (651) 296-6025 to find out how to file objections or present argument.

¹ Minn. Stat. § 14.61.

STATEMENT OF THE ISSUE

Whether Service Oil's application and testimony to the Board established that it is entitled to additional reimbursement for the cost of preparing the Annual Report?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Board reimburses eligible applicants for certain costs incurred in the clean up of petroleum releases pursuant to Minn. Stat. Chap. 115C (2004).

2. Responsible persons are obligated to contract for the cleaning of spills. The Board can only reimburse costs that it determines "were actually incurred and were reasonable."²

3. Applicants generally receive reimbursement of 90% of all eligible costs under the statute.³

4. Service Oil operates a retail gasoline station in Bemidji, Minnesota.⁴

5. Service Oil suffered a release of petroleum products and has been conducting clean-up operations pursuant to a MPCA order.⁵

6. In October of 2004, Service Oil submitted its Annual Report.⁶

7. On March 29, 2005, the Petrofund staff sent a determination letter to Service Oil approving \$14,964.12 in reimbursement.⁷

8. On May 9, 2005, Service Oil appealed the staff's reimbursement determination to the Petrofund Board.⁸

9. Among the reasons set forth in Service Oil's May 9, 2005, appeal were "MPCA requested an Annual Monitoring Report be submitted in their March 31, 2004 letter (item 7)"⁹, "Additional information requested by MPCA, including an expanded receptor survey, was included with the Annual Monitoring Report"¹⁰ and "A substantial amount of additional data was requested by the MPCA in

² Minn. Stat. § 115C.09.

³ Minn. Stat. § 115C.09.

⁴ Testimony of Dirk Lenthe.

⁵ Ex. 1.

⁶ Ex. 4.

⁷ Ex. 2.

⁸ Ex. 1.

⁹ Ex. 2.

¹⁰ Ex. 1.

letters dated 4/1/2003, 8/11/2003, 11/26/2003, 3/31/2004 including as updated well receptor.”¹¹

10. On July 13, 2005, the Board considered Service Oil’s appeal and approved reimbursement in the total amount of \$15, 940.62.¹²

11. The Board failed to approve \$2,725.50 in annual report writing costs.¹³ The Board determined the annual report writing costs were unreasonable since they exceeded the maximum charges listed under Minnesota Rules.¹⁴

12. On August 15, 2005, Service Oil appealed the Board’s July 13, 2005 determination.¹⁵

13. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

14. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

Minnesota law¹⁶ gives the Board and the Administrative Law Judge authority to conduct this proceeding, to consider the issues raised here, and to make findings, conclusions, and orders.

1. The Board gave Service Oil proper and timely notice of the hearing, and it also fulfilled any other procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.

2. Service Oil has the burden of proving by a preponderance of the evidence that it is eligible for reimbursement for the extra costs in preparing the annual report.¹⁷

3. Costs for preparing an annual report that exceed the maximum labor charges allowed are unreasonable.¹⁸

¹¹ Ex.1 on page 15 of 16 Consultant Change Order Form.

¹² Ex. 3 Tape of 7-13-05 Board Hearing, Ex. 2.

¹³ Ex. 3.

¹⁴ Minn. R. 2890.1300.

¹⁵ Ex. 2.

¹⁶ Minn. Stat. § 15C.12, Minn. Stat. § 14.50, Minn. R. pt. 2890.4600 subp. 2(A).

¹⁷ Minn. R. 1400.7300 subp. 9.

4. Minnesota Rules, however, allow for deviation from the maximum cost requirements when they are approved, in writing, by the agency. The Rule states:

... costs for tasks performed that are different than or *in addition to* those specified in a proposal for a step of services ... are not prima facie unreasonable when the agency *states in writing* before performance of those tasks that the performance of those tasks is necessary and appropriate ... [Emphasis added]¹⁹

5. By letter dated March 31, 2004, the Minnesota Pollution Control Agency requested additional information which was outside the scope of a normal annual report.²⁰

6. Twice in its Application for Reimbursement, Service Oil put before the Board the information and tasks required by the Minnesota Pollution Control Agency. First in the May 9, 2005 letter from Service Oil to Ms. Colleen Schultz.²¹ And second, on page 15 of 16 of the Consultant Services Change Order Form.²²

7. Service Oil has established by a preponderance of the evidence that by letter dated March 31, 2004 the Minnesota Pollution Control Agency requested additional information be included in the October 2004 Annual Report and that they are therefore eligible to receive reimbursement for the additional costs in preparing the annual report.

8. The Administrative Law Judge adopts as Conclusions and Findings more appropriately described as Conclusions.

Based upon these Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED: That the Commissioner of the Minnesota Department of Commerce REVERSE the decision of the Board and AWARD Service Oil \$2,725.50 in additional costs for the preparation of the October 2004 Annual Report.

¹⁸ Minn. R. 2890.1300.

¹⁹ Minn. R. 2890.2100 subp.

²⁰ Ex. 1, Ex. 2, see also Ex. 6.

²¹ Ex. 1.

²² Ex. 1.

Dated: July 31, 2006

s/James E. Lafave

JAMES E. LAFAVE
Administrative Law Judge

Reported: Tape-recorded, 1 tape
 No transcript prepared

MEMORANDUM

Service Oil seeks \$2,725.50 in additional costs for the preparation of the October 2004 Annual Report. In this proceeding Service Oil must demonstrate by a preponderance of the evidence that the information submitted to the Board, that served as the basis for its decision, established that Service Oil is eligible for the reimbursement.

The Board denied the additional reimbursement. It claimed Service Oil did not prove that the additional costs were necessary and there is nothing in the record to establish a deviation under Minnesota Rules. The Administrative Law Judge disagrees.

Minnesota Rules list the maximum charges allowed for submissions to the agency.²³ The Rules, however, also allow for deviation from those maximum charges when the applicant can show that the agency, before the performance of the additional task, approved in writing, that the task was necessary and appropriate.²⁴

In Service Oil's Petrofund application it presented evidence to the Board that by letter dated March 31, 2004 the MPCA required Service Oil to perform and document additional tasks. Those tasks were performed and included in Service Oil's October 2004 Annual Report. The fact the MPCA, on its own initiative, required certain tasks to be performed is evidence that the tasks were "necessary and appropriate".

The Board had the evidence in Service Oil's Petrofund application, the October 2004 Annual Report and the testimony from the hearing when making its determination. The Board failed to consider Service Oil's evidence concerning the additional tasks required by the MPCA. Service Oil's submissions while admittedly not as complete as one would like, still meet its obligation to demonstrate by a preponderance of the evidence it is eligible for additional reimbursement.

For the reasons listed above the ALJ respectfully recommends the Commissioner REVERSE the Board's decision and AWARD Service Oil \$2,725.50 in additional costs for the preparation of the October 2004 Annual Report.

J. E. L.

²³ Minn. R. 2890.1300 subp. 6.

²⁴ Minn. R. 2890.2100 subp.